No. 09-1576

IN THE

Supreme Court of the United States

JAMES BANNISTER,
Petitioner,

v.

ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE INNOCENCE NETWORK AND THE INNOCENCE PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus the Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The Innocence Network currently has 56 members, who represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent individuals, the Innocence Network promotes further study and advocates reform to improve the truth-seeking functions of the criminal justice system in an effort to prevent future wrongful convictions.

Amicus the Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and to reforming the criminal justice system to prevent future injustice. The Innocence Project was created by Barry C. Scheck and Peter J. Neufeld in 1992 and is a non-profit legal clinic af-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief. We have filed their consent letters with the Clerk of the Court.

[2] The member entities are listed in the Appendix

filiated with the Benjamin N. Cardozo School of Law at Yeshiva University. As a result of the Innocence Project's efforts, DNA testing has been used to exonerate 255 innocent individuals who spent a combined 3,245 years incarcerated for crimes they did not commit. The Innocence Project works to reform the criminal justice system by crafting legislation to increase access to post-conviction DNA testing, proposing reforms to improve the accuracy of eyewitness identification, and working to establish national standards in forensic science.

The Innocence Network and the Innocence Project have a direct interest in stopping the use of consistency provisions, which plainly increase the likelihood of wrongful convictions, and therefore respectfully file this *amici curiae* brief in support of James Bannister's petition for certiorari.

SUMMARY OF ARGUMENT

The goal of the Innocence Network and the Innocence Project is a world without wrongful convictions. To that end, *amici* are committed to assuring that the judicial process functions in such a way that only the guilty are incarcerated. Informant or "snitch" testimony, of the kind at issue in this case, is a primary cause of wrongful convictions. We estimate that in more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant.

Consistency provisions are clauses in plea agreements in which cooperators or informants agree to testify to a specific version of events satisfactory to the prosecutor, in exchange for certain preferential treatment. The use of consistency provisions exacerbates the dangers of cooperator testi-

mony, violates defendants' rights to a fair trial, and should be stopped. Testimony from informants who have agreed with prosecutors to testify consistently with a certain version of the facts in exchange for certain treatment will exacerbate the inherent problems of informant testimony, obscure the search for truth, and increase wrongful convictions. The Innocence Network and the Innocence Project submit this brief in support of Petitioner and urge the Supreme Court to grant certiorari to review the constitutionality of prosecutors' use of consistency provisions in plea agreements that contractually bind witnesses to give particular testimony at a criminal trial.

ARGUMENT

As demonstrated in James Bannister's petition for a writ of certiorari, consistency provisions have been used in jurisdictions across the country, particularly in those cases in which there is reason to believe the cooperating witness is unreliable. If the Supreme Court does not grant certiorari, prosecutors in states that allow the provisions will have a green light to use consistency provisions in future plea agreements to ensure that informants – particularly those who have given inconsistent statements in the past – do not change their stories when they testify in court. As some jurisdictions already prohibit consistency provisions, these injustices will be perpetrated unevenly across the United States. Certiorari is appropriate to prevent the injustice, and inconsistent justice, of this result.

A. INFORMANT TESTIMONY IS INHERENTLY UNRELIABLE AND THE USE OF SUCH TESTIMONY CAN HAVE DANGEROUS CONSEQUENCES

It is well established that testimony by police informants and cooperating witnesses is problematic. A comprehensive study in 2005 by the Center on Wrongful Convictions found that testimony provided by informants who have incentives to lie accounted for 45.9% of wrongful convictions in the cases studied, and was the leading cause for sentencing innocent people to death.[3] Additionally, the Illinois Commission on Capital Punishment reported in 2002 that many in-custody informant testimonies were not credible and led to wrongful convictions.[4] These findings are hardly surprising – co-

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[3] Rob Warden, Nw. Univ. Sch. of Law Ctr. on Wrongful Convictions, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row (2004-05) ("Snitch System") 3, available online: <http://www.law.northwestern.edu/wrongfulconvictions>. *See also*, Barry Scheck et al., Actual Innocence: When Justice Goes Wrong and How to Make it Right 246, 361 (2001) (finding informants involved in 21% of the 62 exonerations examined and noting that, out of the first 74 DNA exonerations, 19% of the convictions involved "informants/snitches"); Samuel R Gross et al , *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. & Criminology 523, 543-44 (2005) (noting that, out of 340 exonerations, at least 97 cases involved perjury by a "jailhouse snitch" or another witness who stood to gain from the false testimony); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L Rev. 55, 76, 86 (2008) (examination of the causes of error in the first 200 DNA exonerations shows that false informant testimony was involved in 18% of those cases).

[4] George H. Ryan, *Report of the Governor's Commission on Capital Punishment*, Apr. 15, 2002, p. 122, available online:

operators and informants are *both* highly motivated to curry favor with prosecutors in order to gain preferential treatment, *and* convicted criminals themselves who may not necessarily place a high value on telling the truth to law enforcement officials.

The Innocence Project has helped exonerate dozens of innocent individuals who were wrongfully convicted based on informant and cooperator testimony that was later found to be untruthful. The stories of these exonerees bear striking similarities to James Bannister's story and illustrate the often tragic consequences of allowing prosecutors to rely on informant testimony.

Dennis Williams was exonerated after 17 years on death row. Williams was convicted in Illinois in 1978 and sentenced to die for the rape of a young woman and the murder of her and her fiancé. Williams and his three friends and codefendants lived near the crime scene and were seen on the street the night of the crime.

The State's chief witness in the case was a 17-year-old named Paula Gray who claimed to have been at the scene of the crime with Williams and his friends. After her testimony secured indictments of all four men, she recanted her incriminating testimony against the four men and the charges against one of the other defendants were dropped. Williams won a new trial in 1985. Gray, who had been convicted as an accomplice and for perjury after her recantation, reverted to her original story and testified against Williams. He was again convicted.

<http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf>.

A group of journalism students began examining Williams's case in 1996. They found a witness who had tipped police to the identity of the real killers shortly after the crime, but whose tip was never investigated. The students also tracked down two of the men guilty of the crime, who eventually confessed. DNA testing corroborated the confessions and showed that Gray's cooperating testimony against Williams was entirely false. Williams was released in 1996 after 17 years of wrongful incarceration.

Like Williams, James Bannister has already had one verdict overturned. Like Williams, Bannister's second conviction is based on cooperator testimony of an alleged accomplice whose story changed repeatedly over the years.

In 1986, Dennis Halstead, John Restivo, and John Kogut were convicted of the rape and murder of a 16-year-old girl on the basis of Kogut's confession, which implicated the other men. Kogut later recanted, and DNA evidence proved that they were all innocent. The three men were exonerated in December 2005, after nearly 19 years of wrongful incarceration. Again, Bannister similarly is convicted solely on the basis of inconsistent, alleged accomplice testimony.

Analogous cases involving false alleged accomplice testimony are myriad: Marcellius Bradford, Larry and Calvin Ollins, and Omar Saunders were convicted of the 1986 kidnapping, rape, and murder of a 23 year-old medical student in Chicago on the basis of Bradford's confession implicating the men. Bradford later recanted his statements, saying police coerced him into falsely confessing and

that he falsely implicated his codefendants to avoid his own life sentence.

In 1986, Arthur Mumphry was convicted of the rape and murder of a 13-year-old girl and spent nearly 18 years in prison based on the testimony of an alleged accomplice who testified in exchange for a more lenient sentence. After Mumphry spent nearly two decades in prison, DNA evidence revealed that the alleged accomplice's testimony was false and Mumphry was innocent.

Bruce Nelson was convicted of rape and murder based on the confession of Terrence Moore, who implicated Nelson as the instigator of a robbery scheme. After serving nine years in prison, DNA evidence revealed that the alleged accomplice's testimony was false and Nelson was released from prison.

This Court has long recognized that relying on statements from cooperating co-defendants (like those at issue in this case) can be particularly problematic, as these and other stories show. *See Lee v. Illinois*, 476 U.S. 530, 541 (1986) ("truthfinding function of the Confrontation Clause is uniquely threatened" by admission of co-defendant's confession without cross examination); *Bruton v. United States*, 391 U.S. 123, 141 (1968) (co-defendant's statements are "less credible" due in part to his strong motivation to implicate the defendant). Consistency provisions increase these concerns because such provisions prevent the jury from testing the cooperating witness's statements in a meaningful way.

B. Consistency Provisions Exacerbate the Risks of Cooperator Testimony

We already know that cooperators and informants are highly motivated and willing to lie to gain advantageous treatment from law enforcement officers. Countless wrongful convictions (like those described above) demonstrate this. When consistency provisions are used in plea agreements, cooperator testimony is rendered so unreliable as to be intolerable to due process.

First, consistency provisions are typically used only where the witness has given inconsistent statements to law enforcement in the past. This means that by definition a consistency provision witness has at one time or another been willing to lie (or at least has been mistaken) in his statements to investigators. There is thus greater reason than even in the standard cooperator case to believe that the witness may be lying in his inculpatory testimony.

Second, consistency provisions make even more explicit what the witness must do to get the reward he seeks – tell a version of events that is consistent with what he said at some prior point in time. A standard plea agreement merely requires the witness to testify truthfully; the witness is left to determine what that testimony might be. By contrast, where a consistency provision is used, the witness understands perfectly that if he says x, he will receive y. The witness is thus more clearly incentivized to say x than when he is under a standard plea agreement. As noted by the authors of a study on wrongful convictions and informant testi-

mony, "[E]xperience shows pretty much what you would expect – that when the criminal justice system offers witnesses incentives to lie, they will."[5] In this way, the use of consistency provisions magnifies the already significant problems associated with co-operator testimony, so as to violate due process.

C. CONSISTENCY PROVISIONS STRIP DEFENDANTS OF IMPORTANT PROCEDURAL PROTECTIONS, INCREASING THE LIKELIHOOD OF A WRONGFUL CONVICTION

As demonstrated in Petitioner's brief, the use of consistency provisions violates due process by subverting the jury's truth-finding function and undermining the effective cross-examination critical to a fair trial. Through the work of the Innocence Network and the Innocence Project, we well understand that procedural guarantees of fairness can be the difference between the exoneration and conviction of an innocent man, and we therefore comment briefly on these issues as well. The use of consistency provisions prevents criminal defendants from obtaining a full and fair adversarial testing of the relevant facts before a jury.

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[5] Snitch System at 2. Out of the 111 death row exonerations since the 1970s, 45.9% of them involved witnesses with incentives to lie (e g., leniency in their own sentencing). Snitch and informant testimonies constitute the leading cause of wrongful convictions in American capital punishment cases - ahead of erroneous eyewitness identification testimony (25.2%), false confessions (14.4%), and false or misleading scientific evidence (9 9%). *Id.* at 3.

1. CONSISTENCY PROVISIONS INTERFERE WITH THE JURY'S ROLE AS FACTFINDER

"The Constitution recognizes an adversary system as the proper method of determining guilt . . . ." *Singer v. United States*, 380 U.S. 24, 36 (1965). This Court has long recognized that "the maintenance of the jury as a factfinding body in criminal cases is of such importance and has such a place in our traditions" that courts should "avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Id.* at 34 (quoting *Patton v. United States*, 281 U.S. 276, 312-13 (1930)). This is because juries are "the tribunal which the Constitution regards as most likely to produce a fair result." *Singer*, 380 U.S. at 36.

The pre-screening and selective presentation – indeed shaping – of certain testimony by the State diminishes the role of the jury to decide what testimony is truthful. Instead, consistency provisions give the prosecutor the power to determine what is truthful and then direct a witness to testify consistently therewith (or be denied preferential treatment). Consistency provisions thus improperly shape what the jury will consider "truthful" and, worse, give such testimony the imprimatur of the government.

In this way, as Petitioner's brief explains, consistency provisions unfairly bolster the credibility of an informant's testimony. A plea agreement listing certain dates and times of "truthful" testimony carries the imprimatur of the government. It

tells the jury that certain statements that the witness made in the past (and on the stand) are truthful – or at the very least that the government believes they are. *See United States v. Young*, 470 U.S. 1, 18-19 (1985). Plea agreements containing consistency provisions are legally binding, written documents, signed by the prosecutor, whose signature makes clear to the jury that it should weigh the testimony given pursuant to the agreement heavily. These factors create a serious risk that the jury will be unduly influenced by the State's blessing of certain statements made by the witness.

2. CONSISTENCY PROVISIONS PREVENT ADEQUATE ADVERSARIAL TESTING OF DISPUTED FACTS

Cross examination of the informant does not provide a sufficient remedy to cure the inherent problems associated with consistency provisions. The right of cross-examination exists "to prevent depositions or *ex parte* affidavits . . . being used against the prisoner *in lieu* of personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Barber v. Page*, 390 U.S. 719, 721 (1968) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

Consistency provisions turn this process on its head. Instead of statements being made, tested, and then appraised by the jury, a wholly different

course is followed. First, several (conflicting) statements are made. The prosecutor then decides which of these statements she finds truthful. The witness agrees in writing that a certain statement is truthful, and, upon penalty of the loss of his deal with the prosecutor, that that statement is the one he will make to the jury. Such a statement is then labeled as "truthful" in a written agreement with the prosecutor. Defendants cannot cross-examine the prosecutor's decision to deem certain prior statements of the witness "truthful." Nor can defendants cross-examine the prosecutor's actual or implied vouching for the truthfulness of a statement given pursuant to a consistency provision.

Consistency provisions undermine the effectiveness of a defendant's right to cross-examine a witness on all of the witness's previous statements. Under the terms of the witness's plea agreement with the government, the witness is compelled to testify consistently with certain statements – admitting that these statements were wrong would undo his deal and cause him to forfeit the benefit of his bargain with the prosecutor.

Moreover, the prior "statement" that is deemed "truthful" by the cooperation agreement may be one the witness himself subsequently denied making (which is indeed the situation in the case at bar). The statement is thus one that was recorded by individuals who are not necessarily witnesses, but are usually police. The police therefore may dictate the "truth" at trial by virtue of how they record or recollect a witness interview. This severely limits the defendant's ability to effectively cross-examine

how this particular version of "the truth" came to be before the jury.

Consistency provisions also impact the substance of the information that witnesses provide to the jury. First, witnesses will likely feel compelled to testify in the same way as directed by the consistency provision even if, once in the courtroom, they remember things differently. Witnesses often testify months, if not years, after speaking with the police or prosecutors, yet their testimony will not reflect any new information or a new understanding of events gained in the intervening time if witnesses must maintain the account previously given to law enforcement.

Second, the defense, through its own investigation and on cross-examination, may introduce new facts to make witnesses consider events in a new way. Coerced fidelity to formerly entered statements prevents witnesses from responding to the new information and testifying completely in light of a new consideration of information or events.

Third, consistency provisions deliberately dull the impact of confrontation. Such provisions signal to witnesses that they need not be entirely forthcoming when under oath in the courtroom, making it more likely that witnesses will continue to tell a predetermined account, fabricated or otherwise. Witnesses are unfairly fortified against the necessary "testing in the crucible of cross-examination" through which "reliability can best be determined." *See Crawford v. Washington*, 541 U.S. 36, 61 (2004).

"[T]he evidence developed against a defendant shall come from the witness stand in a public

courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (internal quotation marks omitted). In effect, where consistency provisions are used, the evidence developed against a defendant is crafted, and the truth is defined, out of the sight of the jury and beyond the defendant's ability to test it. This is contrary to the full and fair adversarial process envisioned by the Constitution.

D. PETITIONER'S CASE PROVIDES AN EXCELLENT OPPORTUNITY TO GRANT CERTIORARI AND PROHIBIT THE USE OF CONSISTENCY PROVISIONS

The record in this case could not be clearer that the linchpin of Petitioner's conviction was the testimony of a single cooperating witness who changed his story when it suited his needs. Prosecutors made sure that this cooperator would testify only one way on the stand by cutting a deal with the cooperator: the cooperator would testify consistently with certain post-arrest statements and pre-plea-agreement interviews he had given to police and prosecutors and, in exchange, the State would agree to vacate one of his murder convictions and to recommend a significant reduction in his sentence for another. As a result of this consistency provision, the cooperator testified as directed and Petitioner was convicted – despite the fact that the cooperator's testimony was the State's only direct piece of evidence, and despite the fact that Petitioner presented *four* alibi witnesses who each testified that Petitioner was at his mother's house when the crime occurred.

As the trial judge stated on the record after the first trial (and before the cooperator offered his testimony in the next trial): "this is a difficult situation for me because it's one of the few times in 20 years I ever disagreed with a jury's verdict on a particular defendant . . . . [H]ad it been a bench trial I would have found Mr. Bannister not guilty, given the identification and his alibi." Pet. App. 47a.

For Petitioner's second trial, prosecutors had to seek out the cooperator despite his prior vacillating statements (and refusal to testify at Petitioner's first trial). Prosecutors secured the cooperator's testimony against Petitioner by inserting a consistency provision in the plea agreement and cutting a deal. The cooperator's testimony provided prosecutors with the only direct evidence against Petitioner in the second trial. Thus, the Court's consideration of the legitimacy of this type of provision will have a dispositive effect on Petitioner's challenge of his conviction.

* * *

In sum, *amici curiae* the Innocence Network and the Innocence Project support James Bannister's petition for certiorari. The issue presented is one of national importance, as a large number of criminal defendants are convicted on the basis of cooperator testimony, all across the country. Wrongful convictions involving incentivized testimony have been documented in 17 of 38 states studied and one study of death row inmates who were later exonerated found that 39.2% of the cases examined involved cooperator or snitch testimony. John T Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsyl-*

vania Eight, 12 Widener L. Rev. 359, 439-40 (2006). Consistency provisions only increase the inherent unreliability of incentivized testimony, by removing important rights from defendants at trial such that Due Process is violated. Certiorari is necessary to prevent the inconsistent application of these Constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ James L. Brochin

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APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Brandeis Innocence Project (Schuster Institute for Investigative Journalism at Brandeis University), Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto

Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.